

APPEAL NO. 050565
FILED MAY 2, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 10, 2005. The hearing officer determined that the appellant/cross-respondent (claimant) had disability from September 20, 2004, through the date of the CCH due to the compensable injury of _____.

The claimant appeals, contending that he has had disability from March 29, 2003 (when he was taken off work by his then treating doctor) through September 20, 2004 (when he had surgery for the compensable injury). The respondent/cross-appellant (carrier) appeals, contending that the hearing officer's decision be clarified to show that the claimant had disability beginning August 31, 2002, through February 26, 2003. The carrier concedes that the claimant had disability beginning September 20, 2004, through the date of the CCH. Neither party appeals the hearing officer's determination that the claimant had disability from September 20, 2004, to the date of the CCH and the determination for those dates has become final. (Section 410.169). The carrier responded to the claimant's appeal, contending that the "Hearing Officer did not find that the claimant had disability from March 26, 2003, until the time he had surgery in September 2004." There is no response to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable right shoulder injury on _____. The claimant was diagnosed with a right shoulder rotator cuff tear and right shoulder impingement. Although there is scant evidence on the matter, the hearing officer commented that the "Claimant was off work for a period of time after the injury" and that the claimant "apparently received salary continuation benefits for a period of time while he was not working" which is not disputed (although a functional capacity evaluation (FCE) performed on December 19, 2002, indicated that the claimant could perform his preinjury light medium work level). The claimant's then treating doctor, (Dr. B), released the claimant to light duty with one half day light duty and one half day work hardening on January 15, 2003. An FCE performed February 21, 2003, showed claimant able to work at a light-medium level. The claimant had apparently continued to be paid his preinjury wage. Dr. B released the claimant to return to regular duty, on February 26, 2003. The claimant returned to work although there is some dispute whether he was at light duty or on regular duty. The employer apparently did not have claimant's regular light medium work available. The claimant was laid off in a reduction in force on March 23, 2003. The claimant changed treating doctors to (Dr. D) who took the claimant off work on March 26, 2003. Various Work Status Report (TWCC-73) show the claimant continued off work from March 26, 2003, to August 13, 2004. Medical records show the claimant receiving continued medical care with a

recommendation for surgery dated May 11, 2004. The claimant had shoulder surgery on September 20, 2004.

The agreed upon issue was “[D]id the claimant have disability from an injury sustained on _____, and if so, for what period(s)?” The hearing officer found disability from September 20, 2004, to the date of the CCH and did not specifically make findings for the period between August 31, 2002, to September 20, 2004. In view of how the issue is worded we will infer a finding by the hearing officer that the claimant did not have disability between August 31, 2002, and September 20, 2004.

Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment to the preinjury wage. We first look at the period from August 31, 2002, to January 14, 2003. During this time it appears relatively undisputed that the claimant was unable to work but continued to receive his preinjury wage. The claimant only asserts disability from March 26, 2003, to September 20, 2004. The carrier contends that the claimant was paid his full salary (or “received salary continuation”) during this time and therefore, was not entitled to temporary income benefits (TIBs) citing Section 408.003.

Section 408.003(f) effective for claims on or after September 1, 1999, provides:

Salary continuation payments made by an employer for an employee’s disability resulting from a compensable injury shall be considered payment of income benefits for the purpose of determining the accrual date of any subsequent income benefits under this subtitle.

We note, however, that the issues of payment of TIBs or the accrual date of income benefits were not before the hearing officer and are not before us. The only issue before us is disability. Texas Workers’ Compensation Commission Appeal No. 951736, decided December 7, 1995, citing Texas Workers’ Compensation Commission Appeal No. 941073, decided September 26, 1994, were both cases where the injured worker continued to receive his salary but did not work because of the compensable injury. The Appeals Panel held that the injured worker had disability because the worker “was not performing personal services for the employer in exchange for the salary continuation.” The Appeals Panel, in those cases, held that the injured worker “had disability during that period” (that the worker was unable to work). (But see Texas Workers’ Compensation Commission Appeal No. 941180, decided October 11, 1994 for a contrary view). The Appeals Panel went on to note that “the issue of whether the claimant is entitled to TIBs is a different question” and discussed reimbursement. As noted in this case, reimbursement, liability for TIBs, and potential double recovery by the claimant are not issues before us. In this case, insofar as the hearing officer is saying that the claimant did not have disability because he “apparently received salary continuation benefits for a period of time while he was not working,” we reverse the hearing officer implied finding and render a new decision that the claimant had disability from August 31, 2002, through January 14, 2003. We take no position on the accrual of benefits, or reimbursement as these issues are not before us.

For the period of time from January 15, 2003, when the claimant was working in work hardening half days and at light duty half days the claimant apparently continued to receive his preinjury salary. On February 26, 2003, the claimant was released to full duty with apparently some restrictions (See Carrier's Exhibit B page 3) and continued to receive his preinjury salary to March 23, 2003, when the claimant was laid off. We agree that the claimant did not have disability during the period between January 15 and March 23, 2003, while the claimant was in some kind of light duty status continuing to draw his preinjury wage. Insofar as the hearing officer found no disability for this period of time we affirm that implied finding.

For the period from March 26, 2003, to September 20, 2004, there are numerous TWCC-73's in evidence keeping the claimant off work, and medical reports recommending arthroscopic surgery (Claimant's Exhibits 7 page 1 and 8, pages 31 and 32) and continuing treatment which culminated in the claimant's surgery on September 30, 2004. The hearing officer recited in her Background Information section of the decision that when the claimant returned to work (on February 26 after the February 21, 2003, FCE) "by all accounts he was placed in a light duty position until he was laid off on March 23, 2003." The only rationale the hearing officer advances for the implied finding of no disability from March 26, 2003, to September 20, 2004, is that the claimant "admitted that he would have continued working for the employer had work been available." But as the hearing officer noted, that the claimant had been returned to full duty "in a light duty position until he was laid off on March 23, 2003." The claimant actually testified "I cannot do what I used to do," (transcript page 15). There was no evidence of the claimant's status between March 23, 2003, when he was laid off and March 26, 2003, when Dr. D took him off work. We therefore affirm the hearing officer's implied finding that the claimant did not have disability on March 24 and 25, 2003. In view of all of the evidence and the hearing officer's implied finding of no disability between March 26, 2003, and September 20, 2004, without further discussion or explanation, we hold such an implied finding to be against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The implied finding that the claimant did not have disability between March 26, 2003, and September 20, 2004, is reversed and we render a new decision that the claimant did have disability from March 26, 2003, to September 20, 2004.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
701 BRAZOS, SUITE 1050
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge